Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Local Exchange Carrier's Rates,	)	CC Docket No. 93-162
Terms and Conditions for Expanded	)	Phase I
Interconnection for Special Access	)	

MFS TELECOMMUNICATIONS COMPANY, INC. OPPOSITION TO PETITION FOR RECONSIDERATION

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Dated: February 4, 1994

SUMMARY

The Commission's prescription, on an interim basis, of a maximum overhead loading factor for expanded interconnection rates is fully consistent with its authority under Section 4(i) of the Communications Act, with established precedent, and with the public interest.

BellSouth, consistent with its long-standing objections to expanded interconnection service, argues that the Commission must allow its unjustified rates to take effect, and that the Commission's authority under Section 4(i) does not extend to the interim prescription of a maximum overhead loading factor. The facts of this proceeding clearly do not support BellSouth's position. The Commission found that BellSouth -- like other LECs -- has not met its burden of showing that its overhead loadings are just and reasonable after being provided with ample opportunity to justify their overhead loadings. BellSouth attempts to back the Commission into a corner of either accepting its unjustified rates or rejecting its rates and thereby delaying further expanded interconnection service. BellSouth, however, fails to recognize that the Commission cannot be forced into taking action that would be inconsistent with the public interest.

The Commission properly found that BellSouth and the other LECs overhead loadings. The Commission's interim prescription was a necessary exercise of its authority under Section 4(i) and was necessary to prevent unlawful and unreasonable rates from taking effect, and from unnecessarily delaying the implementation of collocation.

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MFS Communications Company, Inc. ("MFS"), by its undersigned counsel, hereby respectfully submits these comments opposing BellSouth's Petition For Reconsideration of the Commission's *First Report and Order* in the above captioned proceeding.[1/] As MFS discusses below, BellSouth's assertions that the Commission lacked authority to establish an interim prescription in the *First Report and Order* are wholly without merit, and are inconsistent with established precedent and the public interest, and so compel rejection of the BellSouth Petition.

I. INTRODUCTION

The BellSouth Petition seeks reconsideration of that aspect of the *First Report and Order* that prescribed maximum overhead loadings for the special access collocation tariffs

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[1/] *Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection for Special Access*, 8 FCC Rcd 8344 (1993) ("*First Report and Order*").

filed by BellSouth and most of the other Tier 1 local exchange carriers ("LECs"). In that Order, the Commission found that the LECs had failed to meet their burden of proof under Section 204(a) of the Communications Act[2/] of demonstrating that their overhead loadings are just and reasonable, and that the loadings were therefore unlawful. The Commission recognized that allowing the unjustified overhead loadings to go into effect would thwart its efforts to ensure that expanded interconnection is available at just and reasonable rates and without unreasonable delay. Therefore, the Commission prescribed maximum interim overhead loading factors pending further investigation. This interim prescription expressly was made pursuant to the Commission's authority under Section 4(i) of the Communications Act,[3/] and ancillary to its authority under Sections 201 and 205[4/] of the Communications Act.[5/] The Commission also established a two-way adjustment mechanism to protect customers and the LECs from any subsequent change in the rates. That is, if following completion of its investigation, the Commission found that the interim prescribed overheads were too low, it would require interconnectors to pay LECs an appropriate amount to offset any loss

BellSouth argues that the Commission did not properly determine that the LECs' rates are unjust and unreasonable. According to BellSouth, Section 204(a) compels the

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2/ 47 U.S.C. Section 204(a).

3/ 47 U.S.C. § 154(i).

4/ 47 U.S.C. §§ 201 and 205.

5/ *Id.* The Commission found that the ARMIS-based fully distributed cost ("FDC") overhead levels represent the best currently available, verifiable and reasonable surrogate for the upper limits of overhead loading factors until the tariff investigation is concluded.

Commission to allow the LECs' rates to take effect after the five-month suspension period. BellSouth argues that the Commission lacks the requisite authority under Section 4(i) to make an interim prescription. MFS shows below that BellSouth's arguments are without merit and represent yet another LEC attempt to delay the provision of expanded interconnections service to potential competitors.

II. BACKGROUND

BellSouth and the other LECs have opposed expanded interconnection service from the very beginning. When MFS filed its Petition for Rulemaking on November 14, 1989 -- which filing precipitated the Commission's opening of CC Docket No. 91-141, which established its mandatory collocation policy -- MFS demonstrated that the LECs' pricing policies and hostility to negotiated interconnection arrangements effectively precluded competition for local telecommunications services.[6/] After the Commission initiated its rulemaking proceeding on expanded interconnection, the LECs consistently opposed the adoption of any policies that would promote effective competition in the local loop. The continuous opposition of the LECs to collocation has resulted in the delay of expanded interconnection service and all the public interest benefits associated with this service. Even though the Commission took the historic step on September 17, 1992 of requiring all Tier 1

[6/] *See* Metropolitan Fiber Systems, Inc. Petition for Rulemaking (filed Nov. 14, 1989) (subsequently assigned CC Docket No. 91-141) at p. 12.

LECs to offer expanded interconnection service,[7] the LECs have been able to delay the introduction of this service by gaming the regulatory process.

When it adopted its rules governing expanded interconnection for special access services, the Commission decided not to prescribe rates or rate structures for the LECs' expanded interconnection services. Rather, the Commission determined that the LECs should be provided flexibility in their overall rate structure at least during the initial implementation of expanded interconnection service. The Commission, however, cautioned the LECs that if they attempted to apply overhead loadings to their collocation charges that differed from the loadings employed for their other service rates, the Commission would subject the rates to close scrutiny and would require detailed justification.[8]

Armed with the flexibility to establish their own rate structure, BellSouth and the other LECs have further frustrated the efforts of the Commission to introduce expanded interconnection service at just and reasonable rates by publishing grossly excessive rates while providing inadequate cost support data.[9] For example, BellSouth's initial expanded

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[7] Expanded Interconnection With Local Telephone Company Facilities, CC Docket No. 91-141, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992) (*Expanded Interconnection Order*), *recon.*, 8 FCC Rcd 127 (1992), *pets. for recon. pending, appeal pending sub nom., Bell Atlantic Corp. v. FCC,* No. 92-1619 (D.C. Cir. Nov. 25, 1992).

[8] *Expanded Interconnection Order*, 7 FCC Rcd at 7429. "The requirement that the LECs use a consistent direct cost methodology and justify any deviations from uniform overhead loadings in the tariff review process will give affected parties substantial protection, while according the LECs some flexibility in setting the initial rate levels for connection charge subelements."

[9] BellSouth and the other LECs filed their expanded interconnection tariffs on February 16, 1993. Originally, these tariffs were scheduled to be effective on May 16, 1993, but the effective date was deferred until June 16, 1993. *See* Letter from Gregory J. Vogt, Chief,

(continued...)

interconnection tariff contained a charge of $4,490.00 for merely processing a request for collocation.[10/] BellSouth also requires collocators to maintain comprehensive general liability insurance that is 25 times the figure cited by similarly-situated LECs without explaining why such extensive coverage is justified. MFS has argued that these rates and terms are patently unreasonable, and demonstrate the LEC's bad faith in establishing collocation services. BellSouth's entire collocation tariff -- like those of the other Tier 1 LECs, remains under investigation by the Commission.

In its *Suspension Order*, the Common Carrier Bureau ("Bureau") found that the tariffs filed by BellSouth and the other LECs raise significant questions of lawfulness as to cost allocations, rate levels, rate structures, and terms and conditions of service.[11/] The Bureau found, *inter alia,* that "[n]one of the LECs provide[d] the required justification for overhead loadings" in their rates,[12/] even though the Commission had cautioned the LECs to justify any difference between overhead loadings used for expanded interconnection and overhead loadings used for other services. The Bureau found that in many cases, the LECs did not provide sufficient cost data to determine the overhead loading factor for a particular rate.

[9/](...continued)
Tariff Division to Southwestern Bell Telephone Company, Special Permission No. 93-384 (May 14, 1993).

[10/] In response to pressure from the Commission, BellSouth has since reduced its rate for processing requests for collocation to $3,130.00. MFS believes that this reduction still results in a grossly excessive charge.

[11/] Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection for Special Access, 8 FCC Rcd 4589 (1993), *apps. for review pending (Suspension Order).*

[12/] *Id.* at 4597. The Bureau partially suspended the LECs's rates to the extent they include overhead loadings that exceed ARMIS levels for special access services.

The Bureau found that the provision of bottleneck facilities at overhead rate levels that exceed ARMIS levels for special access services will unreasonably discourage competitive entry.[13/] Accordingly, pursuant to its authority under Section 205(a) of the Communications Act the Commission suspended the LECs' tariffs in their entirety for one day,[14/] and let them take effect, pursuant to investigation. The Commission made a sole exception to this treatment in the case of the overhead loading factors that were used to establish the proposed collocation charges. The Commission suspended those portions of the LEC overhead loading factors that exceeded the overhead levels identified in their ARMIS reports. Only that portion of the LECs' proposed rates remained suspended while the Commission conducted its investigation. Subsequently, the Bureau in its *Designation Order* specified in detail the information the LECs must provide concerning their overhead loadings.[15/]

On November 12, 1993, the Commission completed its review of the LEC direct cases and other cost data concerning their overhead loadings and concluded that the LECs did not meet their burden of proof under Section 204(a) of the Communications Act[16/] of

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13/ *Id.* The Bureau also found that the LECs have established rate elements for expanded interconnection specifically to recover costs that would ordinarily be included as FDC overheads on all rates. "[I]t appears that the LECs are double-recovering these overhead costs, first in stand-alone rate elements and second in overhead loading factors.

14/ 47 U.S.C. § 205(a).

15/ Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection for Special Access, 8 FCC Rcd 6909, 6913 (1993) (*Designation Order*).

16/ 47 U.S.C. § 204(a).

showing that their overhead loadings are just and reasonable.[17/] The Commission stated that "[t]he LECs have now been given two opportunities to justify their proposed overhead loadings reflected in their expanded interconnection rates, and have failed to do so."[18/] The Commission found that despite the Bureau's directive for the LECs to explain the development of their overhead loading factors for expanded interconnection and to compare them with the overhead loading factors used for DS1 and/or DS3 services, the LECs ignored the issue altogether or did not adequately explain or support their overhead loading factors.

The failure of BellSouth and the other LECs to adequately justify their overhead loadings left the Commission with the Hobson's choice of either allowing the unjustified and unreasonable overhead loadings to take effect, or further delaying the implementation of expanded interconnection service by rejecting or suspending the tariffs. In the first instance, the FCC would allow unsupported and excessive rates to take effect, which would severely inhibit the ability of competitors to obtain collocation. In the second case, the LECs' collocation tariffs would be suspended, thereby prohibiting any party from achieving collocation. The Commission found neither alternative to be acceptable because it would allow the LECs to unilaterally avoid their obligation to provide expanded interconnection service, resulting in a further delay in the implementation of collocation. The Commission, pursuant to its authority under Section 4(i), and ancillary to its authority under Sections 201 and 205, therefore prescribed on an interim basis the maximum permissible overhead loading factor for the LECs' expanded interconnection rates. In so doing, it avoided excessive delay

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17/ *First Report and Order*, FCC 93-493, ¶ 2.

18/ *Id.* at ¶ 26.

in the implementation of its collocation policies and established more reasonable collocation rates.[19/]

III. THE COMMISSION'S INTERIM PRESCRIPTION PURSUANT TO ITS AUTHORITY UNDER SECTION 4(i) IS FULLY CONSISTENT WITH THE REGULATORY SCHEME OF THE COMMUNICATIONS ACT, WITH ESTABLISHED PRECEDENT, AND WITH THE PUBLIC INTEREST.

Section 204(a) requires the Commission to make a determination as to the lawfulness of a rate, in whole or in part, within five months beyond the time the rate would otherwise go into effect. Consistent with this mandate, the Commission determined on November 9, 1993, that the LECs have failed to meet their burden of proof under Section 204(a) of demonstrating that their overhead loadings are just and reasonable. Finding that the competitive goals of the expanded interconnection proceeding would be frustrated by the indefinite suspension of the collocation tariffs, or by allowing unreasonably high rates to take effect, the Commission prescribed, on an interim basis, maximum permissible overhead loadings.

BellSouth argues that the Commission did not have sufficient information to make a final determination that its expanded interconnection rates were unlawful as required by Section 204(a) and therefore, the Commission had no choice but to allow its rates to go into effect. BellSouth also argues that the Commission's interim rate prescription under Section 4(i) is inconsistent with a valid rate prescription under Section 205 because it denies LECs a

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19/ MFS notes that the LEC collocation rates that are currently in effect, even with the reduced overhead loadings, remain grossly excessive, and provide the LECs with an unreasonable return for their collocation services.

full opportunity for hearing on the issue. BellSouth's arguments are wholly without merit, and the Commission's exercise of its 4(i) authority is fully supported by precedent and by public policy considerations.

BellSouth and the other LECs failed to meet their burden of showing that their overhead loadings are just and reasonable after being provided with two opportunities to justify their overhead loadings. [20/] Notwithstanding the Bureau's directive to justify their overhead loadings that exceeded ARMIS levels for special access services less double counting,[21/] several LECs, including BellSouth, used overhead loading factors that exceeded, without explanation, the ARMIS levels for special access services less double counting.[22/] Accordingly, the Commission properly found the rates of BellSouth and the other LECs to be unlawful because they "have failed to meet their burden of proof under Section 204(a) of justifying their proposed overhead loadings for expanded interconnection services."[23/]

BellSouth attempts to back the Commission into a corner by forcing it to choose between accepting BellSouth's unlawful rates or rejecting the rates and thereby delaying expanded interconnection for an indefinite period. The Commission's authority, however, is

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[20/] 47 U.S.C. § 204(a)(1). "[T]he burden of proof to show that the new or revised charge, or proposed charge, is just and reasonable shall be upon the carrier."

[21/] *Suspension Order*, 8 FCC Rcd at 4597.

[22/] *First Report and Order*, FCC 93-493, ¶ 30, n. 83. The Commission found that the overhead loading factors for expanded interconnection services used by Pacific Bell, Lincoln, SNET and a number of the GTE Telephone Operating Companies and United/Centel Companies, did not exceed ARMIS overhead levels double counting. These LECs' rates are not subject to the interim prescription order.

[23/] *Id.* at ¶ 34.

not so limited as to force the Commission to take an action that would be inconsistent with the public interest. The regulatory scheme underlying Section 204(a) provides a balance between the interests of the LEC and the public. The five-month maximum suspension period protects the LECs from having reasonable rate increases unreasonably delayed, while providing the Commission adequate time to ensure that the rates are not excessive. This statutory scheme assumes, however, that the LEC will act in good faith to tariff rates for services that it wants to provide.

This regulatory protection is clearly not required in cases, such as this, where BellSouth and the other LECs are forced against their will to provide services that will promote the public good, and have incentives to file excessive and unlawful rates. In these cases, the five-month suspension period is not necessary to protect BellSouth and the other LECs from unreasonable delay in tariffing new rates, but instead may permit a cynical abuse of process by the LECs in order to delay compliance with a Commission order.[24/] BellSouth and the other LECs are in a position to subvert the public interest rationale of Section 204(a) by purposely filing excessive rates and forcing the Commission to choose between allowing them to take effect, or rejecting the tariffs altogether. In either case, the LEC is able to circumvent the Commission's directive. The Commission's interim prescription of a maximum overhead loading factor is fully consistent with the protection afforded carriers under Section 204, and is a necessary application of the Commission's

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[24/] Moreover, the two-way accounting order established by the Commission provides additional protection for the LECs by assuring that they may recover additional charges in the unlikely case that the Commission ultimately determines that their overhead loadings are not excessive.

broad authority under Section 4(i) to take action necessary to protect the public interest. Indeed, it is the only reasonable means of effecting the Commission's policy.

The Commission's broad authority under Section 4(i) is will settled.[25] In *Lincoln Telephone*,[26] the Court found that the Commission has authority under Section 4(i) to establish an interim billing and collection system.[27] In the *Lincoln* case, MCI and Lincoln Telephone were unable to agree on the lease of business lines by MCI to provide Execunet service. As a result, the Commission prescribed an interim billing and collection arrangement, subject to two-way adjustment, to clear the way for a new service without the delay inherent in the determination of just and reasonable rates. The Court ruled that the establishment of an interim billing and collection arrangement was both a helpful and

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[25] The Commission's broad authority under Section 4(i) is well established. "That provision empowers us to perform any and all acts and to issue such orders not inconsistent with the Act as may be necessary in the execution of our functions. It is well-established, moreover, that the scope of agency discretion in fashioning ratemaking remedies is extremely broad." *AT&T/MPL Tariff*, Memorandum Opinion and Order, 85 FCC 2d 549 (1981) (*citing F.P.C. v. Tennessee Gas Co.*, 371 U.S. 145 (1968); *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177 (1941); *Mesa Petroleum v. F.P.C.*, 441 F.2d 182 (5th Cir. 1971); *City of Chicago v. F.P.C.*, 385 F.2d 629 (D.C. Cir. 1967); *Niagara Mohawk Power Corp. v. F.P.C.*, 379 F.2d 153 (D.C. Cir. 1967)).

[26] *Lincoln Telephone v. FCC*, 659 F.2d 1092 (1981).

[27] Similarly, the Commission also properly prescribed interim rates in the *AT&T ENFIA/BSOC-8 Tariff* case. In this case, AT&T's existing service under tariff was about to expire, and its new tariff with higher rates was not considered to be just and reasonable. The Commission found that it had no record to base a prescription of a rate under Section 205(a). Therefore, the Commission found that the prescription of a interim rate under Section 4(i) to be a necessary consequence of its responsibilities under Sections 201-205 to ensure interconnection on terms and conditions that are just and reasonable for all affected parties. The Commission stated that the characteristic of an interim rate that renders it a valid exercise of discretionary power and not inconsistent with the Act is that it is accompanied by a two-way adjustment. *See ENFIA/BSOC-8 Tariff*, Order on Reconsideration, 93 FCC 2d 739 (1983).

necessary step for the Commission to take in implementing its immediate interconnection order.[28/] BellSouth argues that the *Lincoln* case stands only for the proposition that the Commission may properly establish an interim billing and collection system pursuant to Section 4(i) in situations that do not involve carrier-initiated rates and a Section 204 proceeding. The *Lincoln* decision, however, does not hinge on such technical distinctions. Instead, the court recognized that the Commission has broad authority in the execution of its regulatory functions. Specifically, the court recognized the Commission's authority under Section 4(i) to take the steps necessary to implement its immediate concerns, provided that these steps are not inconsistent with the regulatory process.

The Commission's prescription of a maximum interim overhead loading factor under Section 4(i) was a necessary step to implement expanded interconnection service. Absent the interim prescription, the provision of expanded interconnection service would be further delayed to the public. Therefore, the Commission's action is fully consistent with the statutory scheme underlying Section 204(a) and with the decision in *Lincoln*.[29/]

[28/] *Lincoln Telephone*, 659 F.2d at 1108.

[29/] Furthermore, BellSouth's reliance on the *MCI* case, *MCI v. FCC,* 627 F.2d 322 (D.C. Cir. 1980), for the proposition that the Commission must permit filed rates to take effect if they are not found to be just and reasonable or unjust and unreasonable is misplaced. In *MCI*, the Commission allowed rates that they considered to be unlawful to remain in effect for a period of over three years. The Court found that despite the Commission rhetoric about the rates being unlawful, the Commission was, in fact, unable to determine whether the proposed rates were just and reasonable or unjust and unreasonable. The *MCI* case is clearly inapposite to the instant situation were the Commission has prescribed a maximum overhead loading factor for those LECs, including BellSouth, who have not met their burden of proving that their overhead loadings are just and reasonable.

The Commission's broad authority under Section 4(i) and established precedent clearly support the Commission's interim prescription of a maximum overhead loading factor.[30/] Furthermore, the Commission's prescription is consistent with the regulatory regime under Sections 204(a) and 205. The LECs have been provided ample opportunity to justify their overhead loading factors. The LECs responded in each instance by providing insufficient information on their overhead loadings. As a result, the Commission faced the dilemma of either allowing unjustified rates to go into effect or delaying the implementation of expanded interconnection. Instead, the Commission prescribed an interim maximum overhead loading factor until a decision is made on a permanent overhead loading factor. The establishment of a two-way adjustment mechanism by the Commission further protects carriers and customers from any subsequent changes in the overhead loading factor. For all of these reasons, BellSouth's arguments against the interim prescription -- and its Petition for Reconsideration of the *First Report and Order* -- must be rejected.

IV. CONCLUSION

A review of relevant precedent and public policy concerns clearly demonstrates that the Commission acted within its authority by establishing an interim prescription in the *First*

30/ BellSouth's reliance on the *MCI* case is misplaced. *MCI v. FCC*, 627 F.2d 322 (D.C. Cir. 1980). In *MCI*, the Commission allowed rates that they considered to be unlawful to remain in effect for a period of over three years. The Court found that despite the Commission's rhetoric about the rates being unlawful, the Commission was, in fact, unable to determine whether the proposed rates were just and reasonable or unjust and unreasonable. Unlike *MCI* where the Commission was unable to determine the appropriate rates for the provision of Wide Area Telecommunications Service ("WATS"), the Commission here has prescribed on an interim basis the maximum permissible overhead loading factor using ARMIS FDC overhead loading levels.

Report and Order. BellSouth's arguments to the contrary are clearly without merit, and its Petition for Reconsideration of the Order must be denied.

Respectfully submitted,

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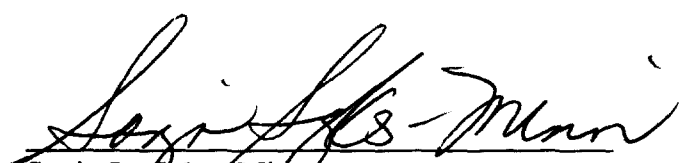
CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February 1994, copie of the foregoing MFS TELECOMMUNICATIONS COMPANY, INC. OPPOSITION TO PETITION FOR RECONSIDERATION in Docket 93-163, were sent via First-Class mail, U.S. postage prepaid, or via Hand-Delivery* to the persons on the attached service list.



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